APPENDIX — VOLUME I

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-775

THE CITY OF NEW ORLEANS AND
HONORABLE MOON LANDRIEU,
Appellants,

versus

NANCY DUKES, d/b/a LOUISIANA CONCESSIONS,
Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT DOCKETED DEC. 21, 1974
JURISDICTION POSTPONED APRIL 14, 1975

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DOCKET ENTRIES

In the United States District Court for the
Eastern District of Louisiana, New Orleans Division

NANCY DUKES d/b/a LOUISIANA CONCESSIONS

versus No. CA-72-2042

THE CITY OF NEW ORLEANS and
THE HONORABLE MOON LANDRIEU

DATE	PROCEEDINGS
8/ 1/72	**Complaint; 2 summs issd.**
8/ 1/72	Pltf's motion for preliminary injunction; ORDERED that the defts. show cause on 8/16/72 at 10 A.M. why Ordinance No. 4744 amending Chapter 46 or Ord. 828, M.C.S., known as the Code of the City of N.O., should not be enjoined and a preliminary injunction issued; (RBW) Ent. 8/1/72 (Issd. to U.S. Marshal)
8/10/72	M.R. on summs. served Hon. Moon Landrieu and The City of N.O., both thru Helen Lorio on 8/7/72
8/14/72	Pltf's mtn. and ORDER continuing the hearing on a preliminary injunction from 8/16/72 to 8/30/72 at 2 P.M. (JMG) 8/12/72. Ent. 8/15/72.
8/30/72	Pltf's Mtn & ORDER (JMG) Continuing the hrg. on the motion for prel. inj. from 8-30-72 to 10-4-72 at 10:AM. Ent. 8-30-72

10/ 3/72	Pltf's 1st supplemental and amending petition
10/ 4/72	Hrg. on mtn. of pltfs. for a preliminary injunction; counsel not present; matter cont'd by the Ct. to be reset. (JMG) Ent. 10/4/72
10/13/72	M.E.; Status conf. held 10/11/72; ORDERED that defts. file an answer to pltf's complaint & amended complaint no later than 10/24/72; that discovery be completed by 11/24/72, etc. (JMG) 10/11/72. Ent. 10/13/72
10/25/72	ANSWER by City of N.O. and Hon. Moon Landrieu
10/25/72	ANSWER to pltf's supplemental & amending complaint by City of N.O. and Hon. Moon Landrieu
10/31/72	Pltf's interrogs. propounded to defts.
12/ 8/72	Motion of pltf. to compel answers to interrogs. & attorney fees; Notice of hrg. on 1/10/73 at 10 A.M.; Memo
1/10/73	Hrg. on mtn of pltf. to compel ans. to interrogs & atty. fees; matter cont'd to 1/24/73 at 10 A.M. (JMG) Ent. 1/12/73
1/24/73	Defts' ans. to pltf's interrogs.
1/24/73	Hearing on mtn. of pltf. to compel ans. to interrogs. & atty. fees; argument; DENIED. (JMG) Ent. 1/26/73
2/26/73	M.E. & ORDER that a status conf. is set for 4/19/73 at 2 P.M. (JMG) Ent. 2/26/73
4/20/73	M.E.; Status conf. held 4/19/73; ORDERED that the parties file a set of stipulated facts & the corresponding mtns. for summ. judg. by 6/18/73. (JMG) 4/19/73 Ent. 4/20/73
6/15/73	Pltf's mnt. & ORDER that Geo. M. Strickler, Jr. be entered as co-counsel for pltf. (JMG) 6/18/73. Ent. 6/18/73

8/16/73	Issg. Notice for a call docket set for 9-5-73 @ 10:AM.
9/ 5/73	Case called & passed
9/10/73	Mtn. & ORDER that Okla Jones, Esq. be entered as co-counsel for pltf. (JMG) Ent. 9/11/73
9/10/73	Pltf's mtn. for summ. judg.; Hearing 9/19/73 at 10 A.M.; Statement; Memo; Affidavits
9/19/73	Hrg. on mtn. of pltf. for summ. judg; matter cont'd. to 10/3/73 at 10 A.M. (JMG) Ent. 9/20/73
9/24/73	Defts. City of N.O. & M. Landrieu's mtn. for summ. judg; Statement; Memo; Hrg. 10/3/73 at 10 A.M.
10/ 3/73	Hrg. on mtn. of pltf. for summ. judg - DENIED; hrg. on mtn. of defts. for summ. judg. - GRANTED (JMG) Ent. 10/4/73
10/ 9/73	JUDGMENT in favor of defts., The City of N.O., Hon. Moon Landrieu, and against pltf., Nancy Dukes, d/b/a Louisiana Concessions, dismissing said pltf's suit, with costs. (CLERK) Ent. 10/10/73
10/29/73	NOTICE OF APPEAL by pltf.
10/29/73	Bond for costs in the sum of $250.00
10/30/73	Mtn. & ORDER that Joseph Neves Marcal III, Esq. be recognized as counsel of record - on appeal. (JMG) Ent. 10/31/73
12/ 4/73	Record forwarded to Court of Appeals this date
10/22/74	JUDGMENT (c.c.) of Court of Appeals & ORDER that the judgment of the District Court is reversed and this cause is remanded to said Court; that defts-appellees pay to

pltf-appellant, the costs on appeal, etc.; Opinion; Issd. as Mandate: 10/21/74. (Record to be returned later.)

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[1] COMPLAINT

Filed: Aug. 1, 1972

In the United States District Court for the
Eastern District of Louisiana, New Orleans Division

NANCY DUKES d/b/a LOUISIANA CONCESSIONS

versus No. 72-2042

THE CITY OF NEW ORLEANS and
THE HONORABLE MOON LANDRIEU

I. JURISDICTION

1. This action is brought pursuant to 42 U.S.C. Sections 1983 and 1985 to redress the deprivation of plaintiffs rights secured by the 14th Amendment to the United States Constitution.

2. Pursuant to 28 U.S.C. Sections 2201-2202, a declaratory judgment is sought declaring section 46-1 of the City Code as amended by Ordinance No. 4744 Unconstitutional as applied to the plaintiff.

3. The jurisdiction of the court is under 28 U.S.C. Section 1331, and 1343(3)(4).

II. PARTIES

4. Plaintiff, Nancy Dukes d/b/a Louisiana Concessions is a citizen of the United States and the State of Louisiana. She is a resident of the City of New Orleans, Louisiana, residing at 8240 Apricot Street in the Parish of Orleans.

5. The Defendant is the City of New Orleans in the State of Louisiana.

6. The Honorable Moon Landrieu, Mayor for the City of New Orleans in his official and individual capacity, City Hall, New Orleans, Louisiana.

III. STATEMENT OF FACTS

7. Plaintiff is the sole proprietor of Louisiana Concessions, a business venture involved in the selling of food, drinks, confections and novelties from movable push carts on the public streets and sidewalks and in/on public and private places. Plaintiff's sales, particularly in the summer months (May, June, July, August, September) consists almost entirely of those sales occurring in the Vieux Carré. Plaintiff's average weekly sales total three hundred and eighty five dollars ($385.00).

8. On September 23, 1971 Councilmen DiRosa of the New Orleans City Council, introduced an ordinance to amend Chapter 46 of Ordinance 828, M.C.S. known as the Code of the City of New Orleans. On January 1, 1972 Ordinance No. 4744, amending Chapter 46, Section 1, went into effect. Prior to the aforesaid amendment there were no restrictions, with a proper permit, as to the type of items sold in the Vieux Carré.

Under the amendment, only the following businesses were allowed to operate on the public streets and sidewalks of the Vieux Carre.

(5) To sell hot tamales and/or hot dogs on foot or from push carts on city streets or public places other than during the Mardi Gras season.

(10) To paint, exhibit or sell paintings and/or portraits or to exhibit or sell works of art on public property in immediate vicinity of Jackson Square.

(12) To sell tickets to supper to be held in private homes.

(19) To conduct a sale of goods, wares or merchandise in issuance, bankruptcy, mortgage, insolvent assignes, receivers, trustees removal or closing out sale or sale of goods, wares and merchandise damaged by fire or otherwise in accordance with Section 51:31 to 51:41 of the Revised Statutes of Louisiana.

(21) Exhibitions, expositions, etc., educational or otherwise, when admission is charged or offerings solicited or accepted.

(24) To conduct sport events when admission is charged or a fee collected in any

manner and when an annual license is not paid to the city.

(25) For amateur and professional prize-fights or boxing and wrestling contests.

(26) For entertainment (other than fairs given by a church for the benefit of the church or by a school for the benefit of the school) dance reviews, plays, festivals, bazaars, etc., with or without music, when admission is charged or when no admission is charged, but subscription fees or contributions are collected.

(27) For Carnival Balls.

(28) For philharmonic or symphonic recitals, operas or other entertainments of like nature when admission is charged or a fee or subscription is collected in any manner.

(29) For orchestras in restaurants or business establishments for purposes of entertainment or dancing when no admission is charged.

(30) For music other than an orchestra for entertainment purposes or dancing when no admission is charged or fee exacted.

(31) For music for entertainment purposes or dancing where admission is charged or fee exacted in any manner.

(32) For dancing when admission is charged.

(33) For a private dance in a public hall.

(34) To give a rummage sale.

(35) For any transient vendor, canvasser, solicitor or merchant engaged in the sale at retail of goods, wares and merchandise and who, for the purpose of carrying on such business hires, leases, or occupies, either in whole or in part, a room, or some other temporary quarter a structure for the exhibition and sale of such goods, wares and merchandise and with the intention to close out or discontinue such business within a period of one year from the date of commencement thereof.

(36) To sell flowers on the city sidewalks or streets.

(41) For the purpose of operating a retail business establishment exhibiting and selling to the public books, magazines, periodicals and other publications or paraphernalia which feature nudity, simulate natural or unnatural sex acts or otherwise appeal to sexually prurient interest and which establishments cater exclusively to adults.

* (See Appendix A for Chapter 46 of the City Code as amended).
* (See Appendix B for Chapter 46 of the City Codes prior to the January 1972 Amendment).

9. On, or about, January 17, 1972, plaintiff's agent and manager, Frank D. Silliker of 346 Harding Street, New Orleans, Louisiana, conducting plaintiff's business in the Vieux Carre, was arrested for a violation of Chapter 46, Ordinance No. 4744 of the City Code.

10. Although this charge was subsequently dismissed, it produced a "chilling effect" upon plaintiff, thus it is not possible for plaintiff to continue in his business in the Vieux Carre without further fear of harrassment and prosecution.

IV. CAUSE OF ACTION

11. Plaintiff avers that the said Ordinance is arbitrary, unreasonable, unconstitutional and discriminatory on its face in that it allows other, similar and comparable, business' to operate in the Vieux Carre, while denying plaintiff due process and equal protection of the law. It also alleges that Ordinance No. 4744 does not further any legitimate goals of the State, and therefore the State does not have a "compelling state interest" in the enforcement of said Ordinance. Thus the Ordinance manifestly violates the due process and equal protection clauses of the 14th Amendment to the United States Constitution.

V. COLOR OF LAW

12. The passage of said Ordinance, by the New Orleans City Counsel and the Mayor of New Orleans, acting separately or jointly, under color of state law, subjects the plaintiff, Nancy Dukes, a citizen of the United States, to the deprivation of her rights secured by the Constitution of the United States.

VI. EQUITY

13. The passage of Ordinance No. 4744 on January 1, 1972 by the New Orleans City Counsel caused irreparable damage, harm, loss and injury to plaintiff.

14. The exclusion of Louisiana Concessions from the Vieux Carre produced a destructive, harrassing and intimidating effect upon said plaintiff.

15. Due to the passage of Ordinance No, 4744 plaintiff has, within the period of January 1, 1972 to the filing date of this suit, lost income in the sum of ten-thousand dollars ($10,000) plus legal interest and continues to lose three-hundred and eighty-five dollars ($385.00) per week.

16. It is therefore necessary that this Court permanently restrain and enjoin defendants, or their agents, from enforcing the aforesaid statute, and to declare said statute unconstitutional as applied to plaintiff and on its face.

VII. PRAYER

WHEREFORE, plaintiff respectfully prays:

a) That this court declare Ordinance No. 4744, amending Chapter 46 of the Code of the City of New Orleans unconstitutional as applied to plaintiff and on its face on the grounds that it violates the due process and equal protection clauses of the United States Constitution.

b) That this court grant preliminary and permanent injunctions enjoining and restraining defendants

or their agents from enforcing Ordinance No. 4744 against the plaintiff.

c) That this court render judgment in favor of plaintiff for the sum of ten thousand dollars ($10,000) plus legal interest, and further to grant plaintiff the sum of three-hundred and eighty-five dollars ($385.00) per week from the filing date until Ordinance No. 4744 is declared invalid.

d) That this court grant the plaintiff his costs, attorneys fees and such other relief as the court may deem fit and proper.

e) That this court grant the plaintiff all general, declaratory, and equitable relief necessary.

/s/ WILLIAM E. RITTENBERG

WILLIAM E. RITTENBERG
American Civil Liberties Union
of La.
Attorney for Plaintiff
606 Common Street
New Orleans, Louisiana 70130
522-0617

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority personally came and appeared Mrs. NANCY DUKES d/b/a Louisiana Concessions, who after being duly sworn did declare under oath, that she is the plaintiff in the foregoing petition, that she has read all of the allegations contained therein, and that all the allegations are true and correct; that if a preliminary and permanent injunction does not issue herein as prayed for that plaintiff, Mrs. NANCY DUKES d/b/a Louisiana Concessions will suffer irreparable damage, harm, loss and injury.

/s/ MRS. NANCY DUKES
MRS. NANCY DUKES

SWORN TO AND SUBSCRIBED
before me this 1st day of
August, 1972.
/s/ WILLIAM E. RITTENBERG
NOTARY PUBLIC

[2] MOTION FOR PRELIMINARY INJUNCTION

(Number and Title Omitted)

Filed: Aug. 1, 1972

Plaintiff's move this Court to grant a preliminary injunction prohibiting defendants and their agents until such time as this Court has had an opportunity to render judgment on the merits of the complaint herein:

1) From prosecuting plaintiff, or her agents, for violation of New Orleans, Louisiana, City Code Chapter 46, Section 46-1.1 otherwise known as Ordinance No. 4744.

2) From any further or future enforcement of said Ordinance against plaintiff or her agents.

/s/ WILLIAM E. RITTENBERG
William E. Rittenberg
American Civil Liberties
Union of La.
Attorney for Plaintiff
606 Common Street
New Orleans, Louisiana 70130
522-0617

ORDER

IT IS HEREBY ORDERED, that the defendants in this matter show cause on the 16th day of August, 1972 at 10:00 AM. o'clock why Ordinance No. 4744 amending Chapter 46 of Ordinance 828, M.C.S., known as the Code of the City of New Orleans, should not be enjoined and a preliminary injunction issued or prayed.

/s/ R. BLAKE WEST
DISTRICT JUDGE

MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION

(Number and Title Omitted)

MAY IT PLEASE THE COURT:

INTRODUCTION

Prior to the amendment of Section 46-1, of Chapter 46 of the City Code of New Orleans the following edibles were permitted to be sold in the Vieux Carré other than during the Mardi Gras season:

(3) To sell candies, nuts and confections on foot or from push carts or from other vehicles on city streets or public places.

(4) To sell ice cream, ice cream bars and related confections from push carts or other vehicles on city streets or public places.

(5) To sell hot tamales and/or hot dogs on foot or from push carts on city streets or public places.

(6) To peddle cooked food, cakes, pies, etc.

(7) To sell fruits and vegetables on foot or from push carts on city street or public places.

* (See Appendix A for Chapter 46 of the City Code as amended).
* (See Appendix B for Chapter 46 of the City Codes prior to the January 1972 Amendment.)

After January 1, 1972 when Amendment 46-1.1 took effect only Section five (5) hot tamales and/or hot dogs sold on foot or from push carts were permitted to be sold in the Vieux Carre.

Since the plaintiff sold candy, nuts, confections and novelties she was effectively excluded from selling these items in the Vieux Carre under the new amendment. Plaintiff depends on her Vieux Carre sales for most of her income in the summer months. Therefore, plaintiffs prohibition from the Vieux Carre is causing her irreparable harm and damage due to loss of income.

THE STATE, AND ITS SUBDIVISIONS HAVE A RIGHT TO REGULATE BUT THE CLASSIFICATIONS MUST BE REASONABLE AND NON-DISCRIMINATORY.

There is no doubt that the city has the authority to regulate peddling on the streets and to compel

peddlers and hawkers while peddling their wares to keep within bounds. *City of New Orleans v. Fargot* 116 Louisiana 369, 40 So. 735 (1906). However, the right of the state or any of its subdivisions, to make classifications of peddlers, for the purpose of regulations, is limited by the restriction that a particular classification must be reasonable and that there shall be no discrimination between members of the same class.

The Courts of Louisiana have repeatedly expressed the view that "due process of the law and the equal protection of the law are had when the laws affect alike all persons similarly situated". *City of Lake Charles v. Wallace* 247 Louisiana 285, 170 So2nd 654 (1964); *Scott v. City of West Monroe*, 95 So2nd 343. District Judge Heebe in *Heynann v. State of Louisiana* 269 F. Supp. 36 (1967) aptly stated that "if all citizens receive in the same circumstances the same treatment, then no citizen is denied his right to the equal protection of the laws, although all citizens might be receiving unfair treatment."

The fact that a legislative body may not discriminate among persons following the same occupation or business is too well known to require the citation of authority. *Frecker v. City of Dayton*, 153 Ohio State 14, 90 NE2d 851 (1950) "So long as the law applies to all alike the requirements of equal protection are met." *State of Louisiana v. Resweber* 67 S.Ct. 374, 329 US 459 (1947).

SAID ORDINANCE, TO BE CONSTITUTIONAL, MUST BE BASED ON A FUNDAMENTAL DISTINCTION, REAL AND NOT FEIGNED.

The function of this court is to determine whether the Ordinance operates equally upon all persons similarly situated. If it does than the discrimination is within permissible legislative limits. If it does not, then the differentiation would be without reasonable basis and the act does not meet the test of Constitutionality. *Slater v. Salt Lake City*, 206 P2d 153, (1949).

Plaintiff fails to see the distinction between his occupation, peddling candy, nuts, confections and novelties and that of the similar and comparable occupation of peddling "hot tamales and/or hot dogs". Both occupations are conducted from push carts, both deal in foodstuffs and both rely on a like clientele and similar wants.

In *Item Co., v. National Dyers and Cleaners* 130 So. 879 (1930) the Louisiana Court of Appeals stated that "it has always been our view that it is not all discriminations which are prohibited by the 14th Amendment, but only those which are unreasonable and which are not based on some fundamental difference justifying the distinction, . . ., and that a state may thus after acting within its police power, place requirements on one kind of business not placed on others, provided those requirements are not unreasonable and are based on some fundamental difference distinguishing the particular kind of business from other businesses."

Judge Rubin has said, "Equal protection only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made." *Cipriano v. City of Houma*, 286 F. Supp. 823 (1968), re-

versed on other grounds on appeal 89 S.Ct. 1897, 395 US 701.

The United States Supreme Court concurred in Judge Rubins view in their decision in *Williams v. State of Arkansas* 217 US 79 (1910). "When a state legislature has declared that in its opinion, policy requires a certain measure, its action should not be disturbed by the Court under the 14th Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

Plaintiff reiterates that there is not a fundamental difference between the legislative distinctions, if any they are feigned not real. Therefore the Ordinance is unreasonable and therefore discriminatory.

SAID ORDINANCE, TO BE CONSTITUTIONAL, MUST NOT BE UNREASONABLE AND ARBITRARY.

Since the use of the streets for the pursuit of private business is not one of the privileges of citizenship, the sale of articles on the streets may be prohibited, yet unreasonable and arbitrary discrimination will render such regulations unconstitutional. While equal protection of the laws is not denied by the absolute prohibition of peddling, under certain conditions and within certain territories, laws which contain arbitrary exceptions or exemptions of persons within the classes to which they generally apply are considered invalid because they deny equal protection of the laws.

In *Standard Homestead Association v. Horrath*, 17 So2d 811 (1944) the Civil District Court for the Parish of Orleans declared that "a statute which is applicable to all persons in like circumstances and does not subject any individual to arbitrary exercise of power does not violate 'due process' or 'equal protection' clauses of state and federal constitution."

In the United States District Court, Fifth Circuit, in a suit attacking the constitutionality of a City Ordinance, Judge Christenberry declared that "a legislative classification will not be set aside by the courts unless the distinction bears no relationship to a legitimate good, and is pure arbitrary." *Heath v. City of New Orleans* 320 F.Supp. 545 (1970).

Plaintiff states that the distinction made by Ordinance No. 4744 is pure arbitrary, and bears no relationship to any legitimate good. Mere legislative assertion that an act was reasonably necessary and appropriate for the accomplishment of a legitimate objective within the states police power does not alone bring the act with the limits of proper exercise of that power.

Plaintiff alleges that Ordinance No. 4744 does not further any legitimate goals at the State, and therefore the State does not have a "compelling state interest" in the enforcement of said Ordinance.

DISCRIMINATION IS APPARENT ON THE FACE OF THE ORDINANCE AND THEREFORE IS UNCONSTITUTIONAL

Plaintiff again stresses that said Ordinance is not based on a fundamental difference, that it is arbitrary and that discrimination is apparent on its face.

A City Ordinance prohibiting the sale in parks and on streets, sidewalks, and soft drinks, candy, sandwiches, peanuts and similar confections was held invalid as a prohibition of the prosecution of a lawful business, in *Frecker v. Dayton* 153 Ohio St. 14, 90 SE2d 851, 14 ALR3d 896. In affirming the lower court, the court said that a legislative body could not discriminate among persons following the same occupation or business and that discrimination was apparent on the face of the Ordinance and evidence showed that there was discrimination between dealers in comparable merchandise and many other street peddlers, hawkers, and hucksters who were licensed to use the streets of the city for the sale of their merchandise.

Ordinance No. 4744 is similar to the City Ordinance prohibited in *Frecker*. Said Ordinance discriminates between peddlers of candy, nuts, confections and novelties and those of hot tamales and/or hot dogs, thus, it clearly discriminates, on its face, among persons following the same occupation or business.

CONCLUSION

Ordinance No. 4744, amending Chapter 46 of the City Code of New Orleans, is unconstitutional and thereby violates the due process and equal protection clause of the United States Constitution.

RESPECTFULLY SUBMITTED,

/s/ WILLIAM E. RITTENBERG

William E. Rittenberg
American Civil
Liberties Union of La.
Attorney for Plaintiff
606 Common Street
New Orleans, Louisiana 70130
522-0617

Dated: July 31, 1972

APPENDIX A

CHAPTER 46

PERMITS[1]

Section 46-1. Permits required for various callings or occasions; schedule of fees therefor.[2]

Every person who shall desire to use the public streets, sidewalks or public places or private places or business establishments for the conduct of any of the businesses or callings hereinafter set forth or to hold meetings or rallies or public entertainments in private or public halls or places shall first apply to

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1 For charter provisions with respect to permits, including a definition of "permit" as there used, see Char., §§4-701 and 4-702. For provisions requiring a permit for engaging in various occupations or undertakings dealt with in the other chapters hereof see those chapters.

2 For licenses on other coin operated machines, see Chapter 16, Coin Operated Machines.

and obtain from the Department of Finance a permit. Such permit shall in each instance state the occasion for which it is issued and the date upon which it will expire and shall be in addition to any other tax or license to which permittee may be liable. Such permits, however, are not valid in the Vieux Carre except as provided in Section 46-1.1 of this Chapter. Such permits shall be paid for by the applicant at the time of issuance according to the following schedule:

(1) To sell the following items on city streets during Mardi Gras season beginning January 6 thru Mardi Gras Day:

(A) For a fixed location:

(a) (1) To sell novelties ..... $ 50.00
(2) To sell candies, nuts and confections 50.00
(3) To sell sandwiches and soft drinks 50.00

(b) There shall be a $50.00 deposit on each permit to guarantee payment of sales tax at the end of the Mardi Gras season. This deposit will be forfeited thirty (30) days after Mardi Gras if taxpayer has not filed his sales tax return. This provision shall not restrict the authority of the Director of Finance to assess and collect sales tax and use tax in accor-

dance with Chapter 56 of Ordinance Number 828, M.C.S., known as the Code of the City of New Orleans.

(c) A specific location can be assigned but not guaranteed by the City.

(d) Vendors at fixed locations on public streets, property or rights-of-way may set up their vehicles or stands during parade time only. Parade time shall be defined as that time commencing two (2) hours before the start of a parade and ending two (2) hours after the passing of the parade. This provision will not apply when there is more than one parade on any Calendar Day in which case vendor must move two (2) hours after the end of the last parade for that Calendar Day.

(e) Where the use of a fixed location would interfere with a parade along a particular route or interfere with public safety, the city shall have the option to deny the use of such location for such period of time as may be necessary.

(f) Vendors selling from fixed locations shall comply with

all provisions of Chapter 38 of Ordinance Number 828, M.C.S., known as the Code of the City of New Orleans relative to traffic regulations, especially, but not exclusively with regard to distances from fire hydrants and intersections.

(g) The trailer, van and any appendant thereto from which a vendor sells shall not exceed thirty (30) feet in length or nine (9) feet in width.

(h) All vendors selling from fixed locations shall have the mayoralty permit as provided for in this section publicly displayed by the permittee at his place of business and failure to do so shall constitute a violation of this chapter.

(i) No Mardi Gras permits for vendors from fixed locations whether on private or public property shall be issued for the area bounded by the downtown side of Iberville St. to the river side of Royal St. to the uptown side of Dumaine St. to the river side of Dauphine St.

(B) For moving locations:

(a) (1) To sell novelties .....$ 25.00
(2) To sell candies, nuts and confections 25.00
(3) To sell sandwiches and soft drinks 25.00

(c) The Department of Finance shall provide moving vendors at their cost with a Mardi Gras Mayoralty Badge which must be publicly displayed on their person at all times and failure to do so shall constitute a violation of this chapter. A permittee shall be required to issue a Mardi Gras Mayoralty Badge to each of his agents or employees and failure to do so shall constitute a violation of this Chapter by the permittee.

(d) No Mardi Gras moving vendors shall be permitted in the area bounded by the downtown side of Iberville St. to the river side of Royal St. to the uptown side of Dumaine St. and to the river side of Dauphine St.

(2) To sell novelties on the city streets other than during the Mardi Gras season.

Per sales outlet, for one year ....$ 25.00

(3) To sell candies, nuts and confections on foot or from push carts or other vehicles on city streets or public places other than during the Mardi Gras season.

Per sales outlet, per year .....$ 25.00

(4) To sell ice cream, ice cream bars and related confections from push carts or other vehicles on city streets or public places other than during the Mardi Gras season.

Per sales outlet, per year .....$ 25.00

(5) To sell hot tamales and/or hot dogs on foot or from push carts on city streets or public places other than during the Mardi Gras season.

Per sales outlet, per year .....$ 25.00

(6) To peddle cooked food, cakes, pies, etc., other than during the Mardi Gras season.

Per sales outlet, per year .....$ 50.00

(7) To sell fruits and vegetables on foot or from push carts on city streets or public places.

Per sales outlet, per year .....$ 25.00

(8) To sell fruits and vegetables from animal-drawn or motor propelled vehicles.

Per vehicle, per year .....$ 50.00

(9) To sell home-manufactured articles or home-grown products on foot.

Per year .....$ 25.00

(10) To paint, exhibit or sell paintings and/or portraits or to exhibit or sell works of art on public property in immediate vicinity of Jackson Square.

Per year .....$ 40.00

(11) To sell razor blades, toilet articles, pencils, shoe laces, etc., on city streets or public places.

Per year .....$ 15.00

(12) To sell tickets to supper to be held in private homes.

Per event .....$ 15.00

(13) Demonstrations of food products or devices in public places or markets, etc.

Per engagement .....$ 25.00

(14) To distribute samples, canvass on city streets or from house to house.

(a) For crew manager, per year .....$ 25.00
(b) For each crew member, per year.. 15.00

(15) To advertise with music, on truck or on foot or in costume or for any other advertising stunt on public property.

(a) Per year $100.00
(b) Per month 15.00

(16) To take and sell photographs on the city streets or other public places where the parties photographed willingly pose for the picture and the picture is developed on the spot where taken and there delivered to the parties photographed.

Per year .....$ 25.00

(17) To take and sell photographs on city streets or in any other public places in any other manner than that described in the preceding paragraph.

Per year $250.00

(18) To operate a hand organ in the city streets.

Per year ..... $ 15.00

(19) To conduct a sale of goods, wares or merchandise in issuance, bankruptcy, mortgage, insolvent assignees, receivers, trustees removal or closing out sale or sale of goods, wares and merchandise damaged by fire or otherwise in accordance with Section 51:31 to 51:41 of the Revised Statutes of Louisiana.

Per sale ..... $ 25.00

(20) Weighing devices, etc. on sidewalks or in public places.

Per nickel machine, per year .... $ 25.00
Per penny machine, per year 15.00

(21) Exhibitions, expositions, etc., educational or otherwise, when admission is charged or offerings solicited or accepted.

Per month ..... $ 25.00

(22) For a circus, a carnival or any other activity wherein mechanical devices for amusement other than coin-operated are used on a temporary basis.

Per year in addition to license ... $100.00

(23) To operate games of sport or skill when admission is charged or a fee collected in any manner, including putt-putt games, shooting galleries, archery, etc.

Per year $100.00

(24) To conduct sport events when admission is charged or a fee collected in any manner and when an annual license is not paid to the city:

(a) Admission not more than 75¢ per event ..... $ 15.00
(b) Admission more than 75¢ per event 25.00

(25) For amateur and professional prize-fights or boxing and wrestling contests:

(a) Admission not more than 75¢ per event ..... $ 15.00
(b) Admission more than 75¢ per event 25.00

(26) For entertainment (other than fairs given by a church for the benefit of the church or by a school for the benefit of the school) dance reviews, plays, festivals, bazaars, etc., with or without music, when admission is charged or when no admission is charged, but subscription fees or contributions are collected.

(a) Admission not more than 75¢ or by invitation

Per event ..... $ 15.00

(b) Admission more than 75¢ per event 25.00

(27) For Carnival Balls .....$ 25.00

(28) For philharmonic or symphonic recitals, operas or other entertainments of like nature when admission is charged or a fee or subscription is collected in any manner.

(a) Admission not more than 75¢ or by invitation
Per event .....$ 15.00

(b) Admission more than 75¢ 25.00

(29) For orchestras in restaurants or business establishments for purposes of entertainment or dancing when no admission is charged.
Per year .....$ 50.00

(30) For music other than an orchestra for entertainment purposes or dancing when no admission is charged or fee exacted.
Per year .....$ 25.00

(31) For music for entertainment purposes or dancing where admission is charged or fee exacted in any manner.
Per year $100.00

(32) For dancing when admission is charged:

(a) Admission not more than 75¢ per event .....$ 15.00

(b) Admission not more than $1.99 per event 25.00

(c) Admission $2.00 or more per event . 50.00

(33) For a private dance in a public hall.
Per event .....$ 15.00

(34) To give a rummage sale.
Per event .....$ 15.00

(35) For any transient vendor, canvasser, solicitor or merchant engaged in the sale at retail of goods, wares and merchandise and who, for the purpose of carrying on such business hires, leases, or occupies, either in whole or in part, a room, or some other temporary quarter a structure for the exhibition and sale of such goods, wares and merchandise and with the intention to close out or discontinue such business within a period of one year from the date of commencement thereof.
Per location, per year $250.00

(36) To sell flowers on the city sidewalks or streets
Per sales outlet, per year .....$ 50.00

(37)-(40). Reserved.

(41) For the purpose of operating a retail business establishment exhibiting and selling to the public books, magazines, periodicals and other publications or paraphernalia which feature nudity, simulate natural or un-

natural sex acts or otherwise appeal to sexually prurient interests and which establishments cater exclusively to adults $10,000.00

(C.C.S., Ord. No. 15,510, § 1; C.C.S., Ord. No. 17,633, § 1; C.C.S., Ord. No. 17,989, § 3; M.C.S., Ord. No. 3027, § 1, 3-4-65; M.C.S., Ord. No. 4346, § 1, 7-16-70; M.C.S., Ord. No. 4359, § 1, 8-6-70; M.C.S., Ord. No. 4360, § 1, 8-6-70; M.C.S., Ord. No. 4439, § 2, 12-18-70; M.C.S., Ord. No. 4555, §§ 1—5, 5-13-71; M.C.S., Ord. No. 4744, §§ 1, 2, 12-8-71.)

Section 46-1.1 Permits valid in the Vieux Carré.

Permits designated by the following numbers of Section 46-1 are valid within the area designated as the Vieux Carré, which is defined as the area bounded by the river, the uptown side of Esplanade Avenue, the river side of North Rampart Street and the lower side of Iberville Street, to wit: Sections (5), (10), (12), (19), (21), (24) through and including (36) and (41). (M.C.S., Ord. No. 4744, § 3, 12-8-71.)

5/1/72

A true Copy of Sections 46-1 and 46-1.1 of the City Code, as amended through December 31, 1971.

/s/ ROGER L. SARRAT
ROGER L. SARRAT
CLERK OF COUNCIL

APPENDIX B

CHAPTER 46

PERMITS[1]

Section 46-1. Permits required for various callings or occasions; schedule of fees therefor.[2]

Every person who shall desire to use the public streets, sidewalks or public places or private places or business establishments for the conduct of any of the businesses or callings hereinafter set forth or to hold meetings or rallies or public entertainments in private or public halls or places shall first apply to and obtain from the Department of Finance a permit. Such permit shall in each instance state the occasion for which it is issued and the date upon which it will expire and shall be in addition to any other tax or license to which permittee may be liable. Such permits shall be paid for by the applicant at the time of issuance according to the following schedule:

(1) To sell the following items on city streets during Mardi Gras season beginning January 6 thru Mardi Gras Day:

---

1 For charter provisions with respect to permits, including a definition of "permit" as there used, see Char., §§ 4-701 and 4-702. For provisions requiring a permit for engaging in various occupations or undertakings dealt with in the other chapters hereof, see those chapters.

2 For licenses on other coin operated machines, see Chapter 16, Coin Operated Machines.

(A) For a fixed location:

(a) (1) To sell novelties ..... $ 50.00

(2) To sell candies, nuts and confections 50.00

(3) To sell sandwiches and soft drinks 50.00

(b) There shall be a $50.00 deposit on each permit to guarantee payment of sales tax at the end of the Mardi Gras season. This deposit will be forfeited thirty (30) days after Mardi Gras if taxpayer has not filed his sales tax return. This provision shall not restrict the authority of the Director of Finance to assess and collect sales tax and use tax in accordance with Chapter 56 of Ordinance Number 828, M.C.S., known as the Code of the City of New Orleans.

(c) A specific location can be assigned but not guaranteed by the City.

(d) Vendors at fixed locations on public streets, property or rights-of-way may set up their vehicles or stands during parade time only. Parade time shall be defined as that time commencing two (2) hours before the start of a parade and

ending two (2) hours after the passing of the parade. This provision will not apply when there is more than one parade on any Calendar Day in which case vendor must move two (2) hours after the end of the last parade for that Calendar Day.

(e) Where the use of a fixed location would interfere with a parade along a particular route or interfere with public safety, the city shall have the option to deny the use of such location for such period of time as may be necessary.

(f) Vendors selling from fixed locations shall comply with all provisions of Chapter 38 of Ordinance Number 828, M.C.S., known as the Code of the City of New Orleans relative to traffic regulations, especially, but not exclusively with regard to distances from fire hydrants and intersections.

(g) The trailer, van and any appendant thereto from which a vendor sells shall not exceed thirty (30) feet in length or nine (9) feet in width.

(h) All vendors selling from fixed locations shall have the

mayoralty permit as provided for in this section publicly displayed by the permittee at his place of business and failure to do so shall constitute a violation of this chapter.

(i) No Mardi Gras permits for vendors from fixed locations whether on private or public property shall be issued for the area bounded by the downtown side of Iberville St. to the river side of Royal St. to the uptown side of Dumaine St. to the river side of Dauphine St.

(B) For moving locations:

(a) (1) To sell novelties .....$ 25.00
(2) To sell candies, nuts and confections 25.00
(3) To sell sandwiches and soft drinks 25.00

(b) All moving vendors must keep moving except when making a sale.

(c) The Department of Finance shall provide moving vendors at their cost with a Mardi Gras Mayoralty Badge which must be publicly displayed on their person at all times and failure to do so shall constitute a violation of this chapter. A permittee shall be required to

issue a Mardi Gras Mayoralty Badge to each of his agents or employees and failure to do so shall constitute a violation of this Chapter by the permittee.

(d) No Mardi Gras moving vendors shall be permitted in the area bounded by the downtown side of Iberville St. to the river side of Royal St. to the uptown side of Dumaine St. and to the river side of Dauphine St.

(2) To sell novelties on the city streets other than during the Mardi Gras season.

Per sales outlet, for one year ....$ 25.00

(3) To sell candies, nuts and confections on foot or from push carts or other vehicles on city streets or public places other than during the Mardi Gras season.

Per sales outlet, per year .....$ 25.00

(4) To sell ice cream, ice cream bars and related confections from push carts or other vehicles on city streets or public places other than during the Mardi Gras season.

Per sales outlet, per year .....$ 25.00

(5) To sell hot tamales and/or hot dogs on foot or from push carts on city streets or public places other than during the Mardi Gras season.

Per sales outlet, per year .....$ 25.00

(6) To peddle cooked food, cakes, pies, etc., other than during the Mardi Gras season.

Per sales outlet, per year .....$ 50.00

(7) To sell fruits and vegetables on foot or from push carts on city streets or public places.

Per sales outlet, per year .....$ 25.00

(8) To sell fruits and vegetables from animal-drawn or motor propelled vehicles.

Per vehicle, per year .....$ 50.00

(9) To sell home-manufactured articles or home-grown products on foot.

Per year .....$ 25.00

(10) To paint, exhibit or sell paintings and/or portraits or to exhibit or sell works of art on public property in immediate vicinity of Jackson Square.

Per year .....$ 40.00

(11) To sell razor blades, toilet articles, pencils, shoe laces, etc., on city streets or public places.

Per year .....$ 15.00

(12) To sell tickets to supper to be held in private homes.

Per event .....$ 15.00

(13) Demonstrations of food products or devices in public places or markets, etc.

Per engagement .....$ 25.00

(14) To distribute samples, canvass on city streets or from house to house.

(a) For crew manager, per year .....$ 25.00
(b) For each crew member, per year.. 15.00

(15) To advertise with music, on truck or on foot or in costume or for any other advertising stunt on public property.

(a) Per year $100.00
(b) Per month 15.00

(16) To take and sell photographs on the city streets or other public places where the parties photographed willingly pose for the picture and the picture is developed on the spot where taken and there delivered to the parties photographed.

Per year .....$ 25.00

(17) To take and sell photographs on city streets or in any other public places in any other manner than that described in the preceding paragraph.

Per year $250.00

(18) To operate a hand organ in the city streets.

Per year .....$ 15.00

(19) To conduct a sale of goods, wares or merchandise in issuance, bankruptcy, mortgage, insolvent assignees, receivers, trustees removal or closing out sale or sale of goods, wares and merchandise damaged by fire or otherwise in accordance with Section

51:31 to 51:41 of the Revised Statutes of Louisiana.

Per sale .....$ 25.00

(20) Weighing devices, etc. on sidewalks or in public places.

Per nickel machine, per year ....$ 25.00
Per penny machine, per year 15.00

(21) Exhibitions, expositions, etc., educational or otherwise, when admission is charged or offerings solicited or accepted.

Per month .....$ 25.00

(22) For a circus, a carnival or any other activity wherein mechanical devices for amusement other than coin-operated are used on a temporary basis.

Per year in addition to license ...$100.00

(23) To operate games of sport or skill when admission is charged or a fee collected in any manner, including putt-putt games, shooting galleries, archery, etc.

Per year $100.00

(24) To conduct sport events when admission is charged or a fee collected in any manner and when an annual license is not paid to the city:

(a) Admission not more than 75¢ per event .....$ 15.00
(b) Admission more than 75¢ per event 25.00

(25) For amateur and professional prize-fights or boxing and wrestling contests:

(a) Admission not more than 75¢ per event .....$ 15.00
(b) Admission more than 75¢ per event 25.00

(26) For entertainment (other than fairs given by a church for the benefit of the church or by a school for the benefit of the school) dance reviews, plays, festivals, bazaars, etc., with or without music, when admission is charged or when no admission is charged, but subscription fees or contributions are collected.

(a) Admission not more than 75¢ or by invitation
Per event .....$ 15.00
(b) Admission more than 75¢ per event 25.00

(27) For Carnival Balls .....$ 25.00

(28) For philharmonic or symphonic recitals, operas or other entertainments of like nature when admission is charged or a fee or subscription is collected in any manner.

(a) Admission not more than 75¢ or by invitation
Per event .....$ 15.00
(b) Admission more than 75¢ 25.00

(29) For orchestras in restaurants or business establishments for purposes of

entertainment or dancing when no admission is charged.

Per year ..... $ 50.00

(30) For music other than an orchestra for entertainment purposes or dancing when no admission is charged or fee exacted.

Per year ..... $ 25.00

(31) For music for entertainment purposes or dancing where admission is charged or fee exacted in any manner.

Per year $100.00

(32) For dancing when admission is charged:

(a) Admission not more than 75¢ per event ..... $ 15.00

(b) Admission not more than $1.99 per event 25.00

(c) Admission $2.00 or more per event . 50.00

(33) For a private dance in a public hall.

Per event ..... $ 15.00

(34) To give a rummage sale.

Per event ..... $ 15.00

(35) For any transient vendor, canvasser, solicitor or merchant engaged in the sale at retail of goods, wares and merchandise and who, for the purpose of carrying on such business hires, leases, or occupies, either in whole or in part, a room, or some other temporary quarter a structure for the exhibition and sale of such goods, wares and merchandise and with the intention to close out or discontinue such business within a period of one year from the date of commencement thereof.

Per location, per year $25.00

(36) — (40). Reserved.

(41) For the purpose of operating a retail business establishment exhibiting and selling to the public books, magazines, periodicals and other publications or paraphernalia which feature nudity, simulate natural or unnatural sex acts or otherwise appeal to sexually prurient interests and which establishments cater exclusively to adults $10,000.00

(C.C.S., Ord. No. 15,510, § 1; C.C.S., Ord. No. 17,633, § 1; C.C.S., Ord. No. 17,989, § 3; M.C.S., Ord. No. 3027, § 1, 3-4-65; M.C.S., Ord. No. 4346, § 1, 7-16-70; M.C.S., Ord. No. 4359, § 1, 8-6-70; M.C.S., Ord. No. 4360, § 1, 8-6-70; M.C.S., Ord. No. 4439, § 2, 12-18-70; M.C.S., Ord. No. 4555, §§ 1—5, 5-13-71.)

5/1/72

A true copy of Section 46-1 of the City Code, as amended through June 30, 1971.

/s/ ROGER L. SARRAT
ROGER L. SARRAT
CLERK OF COUNCIL

[4] MOTION FOR CONTINUANCE

(Number and Title Omitted)

Filed: Aug. 14, 1972

Plaintiff moves this court for a two week continuance of the hearing on a preliminary injunction in this matter set for August 16, 1972, for the following reasons: The attorney for the defendants has advised counsel for plaintiff that the city is considering revising the ordinance in question and has requested that the hearing in the above matter be continued for two weeks in the interest of seeking a compromise.

/s/ WILLIAM E. RITTENBERG
William E. Rittenberg
American Civil Liberties Union
of La.
Attorney for Plaintiff
606 Common Street
New Orleans, Louisiana 70130
522-0617

Dated: August 14, 1972

ORDER

IT IS HEREBY ORDERED, that the hearing on a preliminary injunction in the above matter be continued from August 16, 1972 and reset on the 30 day of August, 1972 at 2:00 P.M. o'clock.

/s/ JACK M. GORDON
DISTRICT JUDGE

(Certificate of Service Omitted in Printing)

[5] MOTION FOR CONTINUANCE

(Number and Title Omitted)

Filed: Aug. 30, 1972

Plaintiff moves this Court for a continuance of the hearing on a preliminary injunction in this matter set for August 30, 1972, for the following reasons: Attorney for Plaintiff has agreed to not press this matter until such time that the City Council of New Orleans acts to amend its ordinance which action the City Council is presently undertaking.

/s/ JOEL P. LOEFFELHOLZ
JOEL P. LOEFFELHOLZ
ASSISTANT CITY ATTORNEY
715 S. Broad St.
822-5410

Dated: August 29, 1972

ORDER

IT IS HEREBY ORDERED, that the hearing on a preliminary injunction in the above matter be continued from August 30, 1972 and reset on the 4th day of October, 1972 at 10:00 A.M. o'clock.

/s/ JACK M. GORDON
JUDGE

(Certificate of Service Omitted in Printing)

[6] FIRST SUPPLEMENTAL AND AMENDING PETITION

(Number and Title Omitted)

Filed: Oct. 3, 1972

The supplemental and amending petition of NANCY DUKES, d/b/a LOUISIANA CONCESSIONS, with respect represents:

I

Plaintiff reaffirms and realleges all of the allegations contained in her original petition.

II

Plaintiff avers that since the original complaint in this matter was filed an ordinance was enacted which amended Section 46-1.1. of Chapter 46 (hereinafter referred to as "the amended ordinance") and purports to outlaw all pushcart sales of food.

III

The amended ordinance also adds the following:

> "Vendors who have continually operated the same business within the Vieux Carre under the authority of this Chapter for eight years prior to January 1, 1972 may obtain a valid permit to operate such business within the Vieux Carre."

IV

The defendants are trying to obtain the same unconstitutional result with different wording to the statute. Under the amended ordinance "Lucky Dog" will continue to be the only business permitted to sell food from push carts and the plaintiff and all others will be prohibited.

V

Plaintiff avers that said ordinance is unconstitutional on its face in that it violates the Due Process and Equal Protection clauses of the 14th Amendment of the United States Constitution and Article I, Section 2 of the Louisiana Constitution that there is no reasonable basis or compelling state interest for the ordinance and the only purpose it serves is to give "Lucky Dog" a virtual monopoly by prohibiting everyone else.

VI

If said ordinance is allowed to remain in effect, petitioner will and is suffering irreparable harm, damage, loss of income and injury of good will. It is

therefore necessary that this Court permanently restrain and enjoin defendants and their agents from enforcing the amended ordinance and to declare said statute unconstitutional as applied to plaintiff and on its face.

WHEREFORE, plaintiff respectfully prays:

a) That this court declare Section 46-1.1. of Chapter 46 of Ordinance Number 828 M.C.S., known as the Code of the City of New Orleans, unconstitutional as applied to plaintiff and on its face on the grounds that it violates the due process and equal protection clauses of the United States Constitution.

b) That this Court grant preliminary and permanent injunctions restraining defendants and their agents from enforcing said ordinance.

c) Plaintiff reiterates her prayer as contained in her original petition.

/s/ WILLIAM E. RITTENBERG
WILLIAM E. RITTENBERG
American Civil Liberties Union
of La.
606 Common Street
New Orleans, Louisiana 70130
522-0617

(Certificate of Service Omitted in Printing)

[7] 3. MOTION OF PLTFS. FOR A PRELIMINARY INJUNCTION: 10:00 AM

Wednesday, October 4, 1972

Counsel not present.

This matter is Continued by the Court to be reset.

---

[8] MINUTE ENTRY of October 11, 1972

(Number and Title Omitted)

Filed: Oct. 13, 1972

A STATUS CONFERENCE was held this date to discuss the above captioned matter.

Present: William E. Rittenberg, Esq. for plaintiff

Joel P. Loeffelholz, Esq., Asst. City Attorney for defendants

Counsel informed the Court of the progress of this action and the recent legislative revision of the ordinance in dispute. The Court concluded that the preparatory stages for trial of this action should commence immediately.

Accordingly, IT IS ORDERED that:

(1) Defendants shall file an answer to plaintiff's complaint and amended complaint no later than Tuesday, October 24, 1972.

(2) Discovery shall be completed by Friday, November 24, 1972.

(3) Upon completion of discovery, counsel shall advise the Court in writing, whereupon the Court will schedule a status conference in order to arrive at a trial date.

/s/ JACK M. GORDON

William E. Rittenberg, Esq.
Joel P. Loeffelholz, Esq.

---

[9] ANSWER

(Number and Title Omitted)

Filed: Oct. 25, 1972

Now into Court through undersigned counsel comes the City of New Orleans and the Honorable Moon Landrieu and for answer to this complaint state:

1.

No answer to paragraphs 1, 2, and 3 is required but if one should be then same is denied.

2.

No answer to paragraphs 4, 5, and 6 is required but if one should be then same is denied.

3.

Paragraph 7 is denied for lack of sufficient information to justify a belief therein.

4.

Paragraph 8 is denied as alleged as it is now moot because of a new ordinance.

5.

Paragraph 9 is moot because of a new ordinance.

6.

Paragraph 10 is denied.

7.

Paragraph 11 is not applicable due to the passage of a new ordinance.

8.

Paragraph 12 is not applicable because of a new ordinance.

9.

Paragraphs 13, 14, 15, and 16 are not applicable due to the passage of a new ordinance.

WHEREFORE, defendants pray that this answer be deemed good and sufficient and that this complaint be dismissed at complainants costs.

/s/ JOEL P. LOEFFELHOLZ
JOEL P. LOEFFELHOLZ
ASSISTANT CITY ATTORNEY
715 S. Broad Street
822-5410

BLAKE G. ARATA
CITY ATTORNEY

(Certificate of Service Omitted in Printing)

---

[10] ANSWER TO SUPPLEMENTAL AND AMENDING COMPLAINT

(Number and Title Omitted)

Filed: Oct. 25, 1972

Now into Court through undersigned counsel comes the City of New Orleans and the Honorable Moon Landrieu and for answer to the supplemental and amending complaint state:

I.

Paragraph I requires no answer but if one is necessary same is denied.

II.

Paragraph II is denied as alleged.

III.

Admitted.

IV.

Paragraph IV is categorically denied and defendants call for strict proof thereof.

V.

Paragraph V is categorically denied and defendants call for strict proof thereof.

VI.

Paragraph VI is categorically denied and defendants call for strict proof thereof.

WHEREFORE, defendants pray that this answer be deemed good and sufficient and that this complaint be dismissed at complainants cost.

/s/ JOEL P. LOEFFELHOLZ
JOEL P. LOEFFELHOLZ
ASSISTANT CITY ATTORNEY
715 S. Broad Street
New Orleans, Louisiana
822-5410

BLAKE G. ARATA
CITY ATTORNEY

(Certificate of Service Omitted in Printing)

[11] PLAINTIFF'S INTERROGATORIES

(Number and Title Omitted)

Filed: Oct. 31, 1972

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiff directs the following interrogatories to defendants. These interrogatories are to be answered, in accordance with the provisions of Rule 33, within thirty (30) days of service.

1. a) Please list the name, address, type of food sold and type of license issued to all vendors licensed to sell food from push carts in the Vieux Carre on August 1, 1972.

b) State how long each vendor licensed on August 1, 1972 had continually operated within the Vieux Carre under the authority of Chapter 46 of the Municipal Code.

2. a) Please list the name, address, type of food sold, and type of license issued to all vendors licensed to sell food from push carts in the Vieux Carre at the present time.

b) State how long each vendor presently licensed has continually operated within the Vieux Carre under the authority of Chapter 46 of the Municipal Code.

3. Please give the total number of vendors selling food from push carts in the Vieux Carre on August 1, 1972.

4. Please give the total number of vendors selling food from push carts in the Vieux Carre at the present time.

5. What was the reason why you recommended to the City Council that they change the ordinance sued upon?

6. Is defendant, The Honorable Moon Landrieu, aware of any members of his administration or his friends that have any kind of an economic interest in Lucky Dog, Inc.?

7. If the answer to interrogatory #6 is affirmative, please give the names of the individuals and the economic interest these individuals have.

RESPECTFULLY SUBMITTED:
/s/ WILLIAM E. RITTENBERG
WILLIAM E. RITTENBERG
Attorney for Plaintiff
606 Common Street
New Orleans, Louisiana
522-0617

DATED: November 1, 1972

(Certificate of Service Omitted in Printing)

[12] MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND ATTORNEY FEES

(Number and Title Omitted)

Filed: Dec. 8, 1972

Now into Court comes the plaintiff, through undersigned counsel, and move this Court to Compel the defendant to answer interrogatories Number 5, 6 and 7 which defendant has refused to answer although said answers are very relevant to plaintiff's case. Plaintiff further moves for expenses and reasonable attorneys fees for prosecuting this motion.

Respectfully submitted:
/s/ WILLIAM E. RITTENBERG
WILLIAM E. RITTENBERG
Attorney for Plaintiff
606 Common Street
New Orleans, Louisiana 70130
522-0617

DATED: December 8, 1972

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ANSWERS TO INTERROGATORIES

(Number and Title Omitted)

Plaintiffs in this case is attempting to prove that the City of New Orleans is unconstitutionally protesting and giving advantage to plaintiff's chief competition, "Lucky Dog, Inc." Interrogatories Number 5, 6 and 7 propounded to defendants are attempts to sbustantiate plaintiff's allegation. For this reason they are obviously relevant and material.

Interrogatory No. 5 is not ambiguous, it is not directed to counsel, it is directed to the defendant, Mayor of New Orleans.

There is no question but that this court has the power to compel adequate answers, *Cone Mills Corp.* v. *Joseph Bancroft and Sons Co.*, 33 F.R.D. 318 (D. Del. 1963). This power is incorporated into Rule 37 F.R.C.P. along with the right to expenses and reasonable attorney's fees for prosecuting this motion.

Respectfully submitted:
/s/ WILLIAM E. RITTENBERG
WILLIAM E. RITTENBERG
Attorney for Plaintiff
606 Common Street
New Orleans, Louisiana 70130
522-0617

(Certificate of Service Omitted in Printing)

[13] 4. MOTION OF PLTF. TO COMPEL ANSWERS TO INTERROGATORIES & ATTORNEY FEES: 10:00 AM

Wednesday, January 10, 1973

This matter is Continued to Wednesday, January 24, 1973, at 10:00 AM.

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[14] ANSWER TO INTERROGATORIES

(Number and Title Omitted)

Filed: Jan. 24, 1973

ANSWER TO INTERROGATORY NO. 1

A.

1. Lucky Dogs, Inc.
   211 Decatur Street
   Hot Dogs;
   21 mayorality permits
   21 no fixed place of business
   occupational licenses
   Issued to Lucky Dogs, Inc. *or* agent.

2. Oliver Lee Roberts
   714 Carondelet Street
   Ice Cream;
   1 mayorality permit;
   no occupational license
   required for ice cream

These were the *only* permits issued and *not* stamped "NOT VALID IN VIEUX CARRE".

(B)

Lucky Dogs: March 1, 1950
Roberts: under his name since March, 1972, before that he was under another company; permit for 20 years.

ANSWER TO INTERROGATORY NO. 2

(A)

See No. 1A above.

(B)

See No. 1B above.

ANSWER TO INTERROGATORY NO. 3

Twenty-Two (22)

ANSWER TO INTERROGATORY NO. 4

Twenty-two (22)

ANSWER TO INTERROGATORY NO. 5

Objected to as being ambiguous because it cannot be determined who the question is directed to; however, if it is directed to undersigned counsel then he answers

same by stating that he did not recommend any changes in the ordinance sued upon.

ANSWER TO INTERROGATORY NO. 6

Objected to as being irrelevant and immaterial to the issue involved in this case as neither Lucky Dog, Inc. or any "friends" of the mayor are parties to this suit.

ANSWER TO INTERROGATORY NO. 7

Not applicable.

/s/ JOEL P. LOEFFELHOLZ
ASSISTANT CITY ATTORNEY
715 S. Broad Street
822-5410

BLAKE G. ARATA
CITY ATTORNEY

(Certificate of Service Omitted in Printing)

[15] 9. MOTION OF PLTF. TO COMPEL ANSWERS TO INTERROGATORIES & ATTORNEY FEES: 10:00 AM

WEDNESDAY, JANUARY 24, 1973

Argument; *DENIED.*

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[16] MINUTE ENTRY of Feb. 26, 1973

(Number and Title Omitted)

Filed: Feb. 26, 1973

The Court having been informed that discovery in this case is now completed,

IT IS ORDERED that a STATUS CONFERENCE is scheduled herein for Thursday, April 19, 1973, at 2:00 o'clock P.M., in chambers.

/s/ JACK M. GORDON

William E. Rittenberg, Esq.
Joel P. Loeffelholz, Esq.

[17] **MINUTE ENTRY OF Apr. 19, 1973**

(Number and Title Omitted)

Filed: Apr. 20, 1973

A STATUS CONFERENCE in the above captioned matter was convened this date.

Present: William E. Rittenberg, Esq. representing plaintiff

Joel P. Loeffelholz, Esq., Asst. City Attorney representing defendants

Counsel agreed with the Court's recommendation that motions for summary judgment by each party would be the most efficient and just approach in resolving this matter. Accordingly,

IT IS ORDERED that the parties file a set of stipulated facts and the corresponding motions for summary judgment by Monday, June 18, 1973.

/s/ JACK M. GORDON

William E. Rittenberg, Esq.
Joel P. Loeffelholz, Esq.

[18] MOTION TO ADD COUNSEL

(Number and Title Omitted)

Filed: Jun. 15, 1973

On motion of Nancy Dukes, Plaintiff, appearing herein through undersigned counsel, and on suggesting to the court that George M. Strickler, Jr. has been associated as co-counsel in the above numbered and entitled proceeding and, accordingly, his name should be entered in the record hereof.

Respectfully submitted:
/s/ WILLIAM E. RITTENBERG
WILLIAM E. RITTENBERG
Attorney for Plaintiff
2833 General Pershing Street
New Orleans, Louisiana 70115
891-4414

ORDER

Considering the above and foregoing,

IT IS ORDERED that the name of George M. Strickler, Jr. be entered on the record as co-counsel for plaintiff in the above entitled and numbered cause.

NEW ORLEANS, LOUISIANA, this 18 day of June, 1973.

/s/ JACK M. GORDON
JUDGE

(Certificate of Service Omitted in Printing)

[20] MINUTE ENTRY
SEPTEMBER 5, 1973

GORDON, J.

The following cases were called this day to show cause why they should not be DISMISSED:

After hearing, IT IS ORDERED that the said cases be disposed of as indicated below:

CIVIL ACTION

* * * *

72-2042 NANCY DUKES, ETC. VS THE CITY OF NEW ORLEANS, ET AL

Attorneys: William E. Rittenberg, Esq.
George M. Strickler, Jr., Esq.
Joel P. Loeffelholz, Esq.

Last Action: 6/15/73: M & O that Geo. M. Strickler, Jr., be entered as co-counsel for pltf.

ORDERED: PASSED:

* * * *

/s/ JACK M. GORDON
UNITED STATES
DISTRICT JUDGE

[21] MOTION TO ADD COUNSEL

(Number and Title Omitted)

Filed: Sept. 10, 1973

On motion of Nancy Dukes, plaintiff, appearing herein through undersigned counsel, and on suggesting to the Court that Okla Jones has been associated as co-counsel in the above numbered and entitled proceeding and, accordingly, his name should be entered in the record hereof.

Respectfully submitted:
/s/ WILLIAM E. RITTENBERG
William E. Rittenberg
Attorney for Plaintiff
2833 Gen. Pershing
New Orleans, Louisiana 70115
Telephone: 891-4414

ORDER

Considering the above and foregoing,

IT IS ORDERED that the name of Okla Jones be entered on the record as co-counsel for plaintiff in the above entitled and numbered cause.

New Orleans, Louisiana, this 10 day of September, 1973.

/s/ JACK M. GORDON
JUDGE

[22] MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted)

Filed: Sept. 10, 1973

Plaintiff moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law; or, in the alternative,

2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

(a) The pleadings as set forth by plaintiff in the original and amended petitions filed in this matter;

(b) Affidavit of Nancy Dukes made in support of this motion for summary judgment;

(c) Defendants' answers to interrogatories as filed herein;

(d) A statement of material facts as to which plaintiff contends there is no genuine issue to be tried, which is submitted herewith in accordance with Rule 4(e) of the Rules of this Court.

/s/ OKLA JONES II
Okla Jones II
Attorney for Plaintiff
606 Common Street
New Orleans, Louisiana 70130
Telephone: 522-0617

(Notice and Certificate of Service Omitted in Printing)

MEMORANDUM IN SUPPORT OF PLAINTIFF DUKES' MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted)

MAY IT PLEASE THE COURT:

Plaintiff Nancy Dukes (hereinafter "Dukes") brought this action against the City of New Orleans and Moon Landrieu, alleging the deprivation of rights secured by the Fourteenth Amendment to the United States Constitution and praying for declaratory and injunctive relief in the enforcement of New Orleans Ordinance 828 M.C.S. 46.1.1, as amended, against the plaintiff and her agents.

This cause of action simply avers that the said Ordinance is arbitrary, unreasonable, discriminatory and unconstitutional on its face in that it allows other similar and comparable businesses to operate in the Vieux Carre while denying plaintiff due process and equal protection of the law. Furthermore, it alleges that Ordinance No. 4744, as amended in August 1972, does not further any legitimate goals of the State, and therefore the State does not have a "compelling state interest" in the enforcement of said Ordinance. Thus the Ordinance manifestly violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

FACTS

Dukes (d/b/a "Louisiana Concessions") is in the business of selling food, drinks, confections and novelties from movable push carts on the public streets, sidewalks, and/or public and private places in downtown New Orleans.[1]

The prime source of business is the Vieux Carre, particularly during the summer months of May through September, when average weekly sales total $385.00. These sales are achieved through various salesmen she employs to assist in the business pursuant to mayorality permits on a percentage basis with them.

On January 17, 1972, Dukes' manager Frank D. Silker, was arrested for violating New Orleans City Ordinance No. 4744 (amending Chapter 46, Section 1),

1 Affidavit of Nancy Dukes, page 1

which in effect banned the vending from push carts of all foodstuffs except hot dogs and hot tamales in the Vieux Carré.[2] The charge was subsequently dismissed. But as a result of this arrest, Dukes initiated a civil suit on August 1, 1972, seeking declaratory and injunctive relief.

On August 31, 1972, the City of New Orleans proceeded to amend Municipal Ordinance Section 46-1 to read that those vendors who had not been operating a business for eight or more years before January 1, 1972, would be prohibited a permit to operate in the Vieux Carré.[3]

Plaintiff then amended her complaint challenging the newly amended ordinance on the same grounds as the old, and further alleging that the defendants were attempting to obtain the same unconstitutional result with different words. It also alleged that the City was attempting to give "Lucky Dog" (a vendor similarly pursuing the same occupation as Dukes) an exclusive monopoly since it would be the only business to sell food from pushcarts in the Vieux Carré. To disallow plaintiff to operate in the Vieux Carré would be detrimental to her business primarily because the vast majority of her customers come from the "Quarter."

2 See pertinent text of the Ordinance in plaintiff's Original Complaint, pp. 2 and 3; and Exhibit "A" of plaintiff's Memorandum in Support of Preliminary Injunction.

3 See plaintiff Dukes' Separate Statement of Material Facts in Support of her Motion for Summary Judgment Made Pursuant to Rule 4(e), Number 7, p. 2.

Plaintiff Dukes has filed this Motion for Summary Judgment on the ground that there is no genuine issue as to any material facts as presented by your mover; therefore, she is entitled to a judgment as a matter of law.

ARGUMENT

1. *Classification Must Be Reasonable and Non-discriminatory.*

It is indubitably clear that cities and municipalities have the power to impose restrictions on a lawful calling such as hawking and peddling as long as the exercise is in conformity with constitutional requirement that such restrictions operate equally upon all persons pursuing the same business or profession under the same circumstances. *City of New Orleans v. Fargot*, 40 So. 735, 116 La. 369 (1906); *City of Lake Charles v. Wallace*, 170 So.2d 654, 247 La. 285 (1964). Therefore, according to *City of Lake Charles v. Wallace, supra, Scott v. City of West Monroe*, 95 So.2d 343, the constitutionality of a statute cannot be sustained which selects particular individuals from a class or locality and subjects them to particular rules or imposes upon them special obligations or burdens from which others in the same locality are exempt. Thus, if a statute or ordinance allows one class of individuals to engage in what is presumptively a legitimate business, while denying such rights to others — as herein involved — it must be based upon some principle which may reasonably promote the public health, safety or welfare. See 11 Am.Jur. §285, 286.

Just as it is clear that cities and municipalities may restrict certain business, it is just as clear that such regulations of occupations cannot be valid where it amounts to an arbitrary or unwarranted interference with the right of the citizen to pursue a lawful business. In *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968), a city ordinance was passed which regulated licensing and hours of business of massage parlors, and prohibiting masseurs or masseuses from treating an individual of the opposite sex, but excluded certain places such as hospitals and the YM(W)CA. The Court, in holding the ordinance unconstitutional (violating Fourteenth Amendment Equal Protection) stated:

> "Recognizing that even though massage parlors are proper subjects for regulation under the city police power, *such regulation, however, must be uniform, fair, impartial in its operation*. Even though statutes are passed in the interest of the public health, safety, or morals, they are void as class legislation whenever they are made to apply arbitrarily only to certain persons or classes of persons or to make an unreasonable discrimination between persons or classes."
>
> (emphasis added)
> 160 S.E.2d at 23.

2. *Ordinance Must Satisfy Both Rational Basis and Compelling State Interest Tests*

The thrust of defendants' argument relative to the constitutionality of the Ordinance is the creation of

the Vieux Carre Commission in the Louisiana Constitution.[4] See La.Const.Art.14, §22A. Because of this creation, they assert that "The City of New Orleans is given broad and sweeping powers of administration and police in the Louisiana Constitution Article 14, Section 22 and Act 159 of 1912."[5]

The pertinent provision of the Louisiana Constitution (Art. 14, §22A) provides:

> "Duties of Commission. Hereafter and for the public welfare in order that the quaint and distinctive character of the Vieux Carre section of the City of New Orleans may not be injuriously affected, and in order that the value to the community of those buildings having architectural and historical worth may not be impaired, *and in order that a reasonable degree of control may be exercised over the architecture of private and semi-public buildings erected on or abutting the public streets of said Vieux Carre section . . .*"
>
> (emphasis added)

At the outset, it should be noted that the Louisiana Supreme Court in *Vieux Carre Property Owners and Associates, Inc. v. City of New Orleans*, 167 So.2d 367, the Court declared an ordinance by the City of New Orleans unconstitutional and contrary to Louisiana Constitution, Article 14, §22A, which attempted to exempt certain areas of the Vieux Carre. In interpreting the

4 Defendants' Memorandum in Opposition to Preliminary Injunction, pp. 3-4.

5 Ibid., at p. 4

above provisions of the Constitution, the Court stated that the language quoted simply means that the Vieux Carre section as a whole "shall be subject to the 'reasonable control' of the city and the commission. . . . But the city and commission must exercise 'reasonable control.' " 223 La. 14 (1953).

Assuming that the purpose of defendants' Ordinance is to protect public welfare and preserve the antiquity of the Vieux Carre, plaintiff fails to see how allowing other vendors to operate, the "threat," if there truly is one, is subsided. Thus, is this a real purpose, necessary and adequate to sustain an unequal classification, or is it rather a "feigned purpose" to eliminate all vendors except Lucky Dogs? Plaintiff Dukes contends that the latter exists herein.

In observing the classification, why is eight years the cut-off date? Is it not just an arbitrary date designed to eliminate all vendors except Lucky Dogs? Plaintiff again contends that the latter is the result of the Ordinance, whether intentional or otherwise.

The District Court for the Northern District of Texas in *Corey v. City of Dallas*, 352 F.Supp. 977 (1972), struck down an ordinance making it unlawful for any person to administer a massage to any person of the opposite sex. The Court held the ordinance unconstitutional in violation of the Fourteenth Amendment equal protection, unreasonable exercise of police power, and unreasonable classification. The theme of that case is stated in pertinent part as follows:

> "In order for legislation affecting a fundamental right to withstand a challenge under the Equal Protection Clause, it is *incumbent on the governmental authorities to show that there was no other practical manner in which the objective of the legislation could be accomplished and that the interest of the government authority is superior to the rights of the persons who may be adversely affected by the legislation.*"
>
> (emphasis added)
> 352 F.Supp. at 980

The United States Supreme Court in *McLaughlin v. State of Florida*, 379 U.S. 184, 85 S.Ct. 283 (1964), held — in which struck down the miscegenation laws — that "if the law deals alike with all of a certain class it is not obnoxious to the Equal Protection Clause." The Court also pointed out that arbitrary and capricious selections can never be justified by calling it classification. See, e.g., *American Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 21 S.Ct. 23; see also *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337; and *McGowan v. State of Md.*, 366 U.S. 420, 81 S.Ct. 1153 (1961).

McLaughlin, supra, further asserts that courts in inquiring about equal protection should not stop after a showing of equal application among the members of the class as defined by the ordinance or legislation. The Court must seek to determine the question of whether the classifications drawn are reasonable in light of its purpose — in this case, whether there is an arbitrary or intentional discrimination between the

classes covered by New Orleans' City Ordinance and those excluded.

3. *An Ordinance Which Curtails the Right to Earn a Livelihood — and Not Just Prohibit It Completely — Violates the Fourteenth Amendment.*

The right to earn a livelihood by pursuing one's legitimate occupation is a right implicit in the Fourteenth Amendment. *Terrance v. Thompson*, 263 U.S. 197 (1923); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932); and *Truax v. Raich*, 239 U.S. 33 (1915). Furthermore, the Supreme Court has recognized that it is not necessary that a right be specifically stated or expressed in the Constitution before it is considered a fundamental right. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Plaintiff Dukes herein has been curtailed and/or restricted in the pursuit of a legitimate occupation by not being allowed to sell her products in the Vieux Carre where the majority of tourists go and where business is the most profitable.

New State Ice Co. v. Liebmann, supra, is dispositive of this legal proposition and states it thusly:

> "Plainly, a regulation which has the effect of denying or *unreasonably curtailing* the common right to engage in a lawful private business . . . cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state under the

guise of protecting the public, arbitrarily, [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restriction upon them."

(emphasis added)
285 U.S. at 278

4. *An Ordinance Which Is Unreasonable and Arbitrary Is Unconstitutional On Its Face*

Plaintiff reiterates that the Ordinance herein involved is not based on a fundamental difference in its classification of said businesses, that it is arbitrary and unreasonable, thereby, being unconstitutional on its face.

A city ordinance governing the hours of billiard halls was held to be unconstitutional because there was no rational relation for placing billiard halls in a unique class, separate and apart from all other businesses which offer like facilities and amusement (i.e. bowling alleys, etc.) in *State v. Greewood*, 280 N.E. 651, 187 S.E.2d 8 (1972). The Court held that the classification was arbitrary and unreasonable and thus, in violation of the Fourteenth Amendment Equal Protection even though the asserted purpose of the ordinance was to promote the public health, safety and welfare.

The City of New Orleans Ordinance suffers from all the defects of the North Carolina ordinance and more. The New Orleans Ordinance not only discriminates among persons following the same occupation and business, but also has drawn an arbitrary date in determining whether or not to allow a legitimate business to be validly licensed.

Accordingly, there should be no issue of material fact with respect to whether the said Ordinance is arbitrary, unreasonable, discriminatory and therefore unconstitutional, and plaintiff's motion for summary judgment with respect thereto should be granted.

CONCLUSION

It is respectfully submitted that plaintiff's motion for summary judgment should be granted, and that New Orleans Ordinance 828 M.C.S. 41.1.1 as amended be declared unconstitutional and thereby in violation of the due process and equal protection clause of the United States Constitution.

Respectfully submitted:

/s/ OKLA JONES II
Okla Jones II
American Civil Liberties
Union of Louisiana
606 Common Street
New Orleans, Louisiana 70130
Telephone: 522-0617
Attorney for Plaintiff
Nancy Dukes

PLAINTIFF DUKES' SEPARATE STATEMENT OF MATERIAL FACTS IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT, MADE PURSUANT TO RULE 4(e)

(Number and Title Omitted)

1. Plaintiff Nancy Dukes (hereinafter "Dukes") does business under the name Louisiana Concessions, and is engaged in the sale and distribution of food stuff, drinks, confections and novelties throughout the public streets and sidewalks of the City of New Orleans, including the Vieux Carré. She employs various salesmen or vendors to assist in her business.

2. Dukes was operating her business pursuant to valid mayorality permits in 1972, when this action was initially commenced.

3. Dukes and salesmen operated the business pursuant to the permits on a percentage basis.

4. The Vieux Carré was the prime source of business for Dukes, particularly during the summer months of May through September, when average weekly sales totaled $385.00.

5. On January 17, 1972, Dukes' manager, Frank D. Silker, was arrested for violating New Orleans City Ordinance No. 4744 (amending Chapter 46, Section 1), which in effect banned the vending from pushcarts of all food stuffs except hot dogs and hot tamales in the Vieux Carré. The charge was subsequently dismissed.

6. As a result of the arrest of her manager, Dukes filed a civil suit on August 1, 1972, seeking a declaratory judgment and injunctive relief.

7. On August 31, 1972, the City of New Orleans amended Municipal Ordinance Section 46-1, to read as follows:

> "Vendors who have continuously operated the same business within the Vieux Carre under the authority of this Chapter for eight or more years prior to January 1, 1972 may obtain a valid permit to operate such business within the Vieux Carré."

8. Through discovery, Lucky Dogs, Inc. has been shown to be the only licensed vendor that will be allowed to operate a business from a push cart in the Vieux Carré under the new amended ordinance.

9. The vast majority of Dukes' customers come from the Vieux Carré, and to disallow her to operate therein is detrimental to her business.

/s/ OKLA JONES II
Okla Jones II
Attorney for Plaintiff
606 Common Street
New Orleans, Louisiana 70130
Telephone: 522-0617

AFFIDAVIT OF FRANK D. SILIKER
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

(Number and Title Omitted)

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

FRANK D. SILIKER,
who, after being duly sworn, deposed that:

He is the agent and manager of the business known as Louisiana Concessions, located at 8240 Apricot Street, New Orleans, Louisiana; that this business is owned and operated by one Nancy Dukes, which business consists of selling drinks, confections and novelties from pushcarts on the public streets, sidewalks and public places of the City of New Orleans, including the Vieux Carré, and that he — as agent and manager — is thoroughly familiar with the operation of this business as conducted by himself and the owner.

During the month of January 1972, on or about the 17th, affiant was arrested while conducting the said business in the Vieux Carré and charged with violation of Chapter 46, Ordinance 4744 of the City Code. At the time of the arrest he was still manager and agent of Louisiana Concessions.

Although this charge was subsequently dismissed, it produced a "chilling effect" upon both him and the owner, thus making it impossible for them to continue their business in the Vieux Carré without further fear of harrassment and prosecution.

During the course of his employment with this business, the Vieux Carré area was the prime source of business, and to disallow operation in that section of the city would be injurious and detrimental to the business.

/s/ FRANK D. SILIKER
FRANK D. SILIKER

(Jurat Omitted in Printing)

AFFIDAVIT OF NANCY DUKES
IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted)

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

NANCY DUKES,
who, after being duly sworn, deposed that:

She is the sole owner and proprietor of Louisiana Concessions, located at 8240 Apricot Street, New Orleans, Louisiana; that she has owned and operated said business for the past four and one-half years, which business consists of selling drinks, confections and novelties from hand-pushed carts on the public streets, sidewalks and public places of the City of New Orleans, including the Vieux Carré, has employed various vendors to assist her in the business, and is thoroughly familiar with the operation of that business as conducted by herself and her vendors.

Affiant was duly licensed with valid mayorality permits for said business for the year 1972, when this action was commenced. The permits were utilized by affiant and/or her salesmen, who were employed on a percentage basis. The area of the Vieux Carré was a prime source of business, and not allowing affiant or her salesmen to operate in the Vieux Carré has been very injurious and detrimental to her business.

/s/ NANCY DUKES
NANCY DUKES

(Jurat Omitted in Printing)

[23] 18. MOTION OF PLTF. FOR SUMMARY JUDGMENT: 10:00 AM.

WEDNESDAY, SEPTEMBER 19, 1973

This matter is Continued to Wednesday, October 3, 1973, at 10:00 AM.

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[24] MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted)

Filed: Sept. 24, 1973

Defendants, the City of New Orleans and the Honorable Moon Landrieu, move the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the defendants' favor dismissing the action on the ground that there is no genuine issue as to any natural fact and that the defendants are entitled to a judgment as a matter of law.

This motion is based upon:

a) A statement of material facts as to which defendants contend there is no genuine issue to be tried;

b) Memorandum of law in support of motion for summary judgment.

/s/ JOEL P. LOEFFELHOLZ
ASSISTANT CITY ATTORNEY
715 S. Broad Street
New Orleans, La. 70119
822-7145

BLAKE G. ARATA
CITY ATTORNEY

(Notice and Certificate of Service Omitted in Printing)

DEFENDANTS' SEPARATE STATEMENT OF MATERIAL FACTS

(Number and Title Omitted)

1.

Plaintiff, Nancy Dukes, does business under the name Louisiana Concessions, and is engaged in the sale and distribution of food stuff, drinks, confections and noveltiesthroughout the City of New Orleans. She employs various salesmen to assist her in her business.

2.

Dukes was operating her business pursuant to valid mayorality permits in 1972.

3.

Dukes and salesmen operated the business pursuant to the permits on a percentage basis.

4.

On August 31, 1972, the City of New Orleans amended Municipal Ordinance Section 46-1 to read as follows:

> "Vendors who have continuously operated the same business within the Vieux Carre under the authority of this Chapter for eight or more years prior to January 1, 1972, may obtain a valid permit to operate such business within the Vieux Carre."

/s/ JOEL P. LOEFFELHOLZ
JOEL P. LOEFFELHOLZ
ASSISTANT CITY ATTORNEY
715 S. Broad Street
New Orleans, Louisiana 70119
822-7145

BLAKE G. ARATA
CITY ATTORNEY

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted)

Plaintiff Nancy Dukes brought this action against the City of New Orleans and Moon Landrieu alleging

denial of equal protection of the laws as guaranteed by Fourteenth Amendment to the United States Constitution.

Dukes is in the business of selling food, drinks, and novelties throughout the City of New Orleans. On January 17, 1972, one of Dukes' employees was arrested for violating New Orleans City Ordinance No. 4744 (Municipal Ordinance Section 46-1 and 46-1.1). As a result of the arrest, Dukes initiated a civil suit on August 1, 1972, seeking declaratory and injunctive relief.

The challenged section of the ordinance as contained in Section 46-1.1 states:

> "Vendors who have continuously operated the same business within the Vieux Carre under the authority of this Chapter for eight or more years prior to January 1, 1972, may obtain a valid permit to operate such business within the Vieux Carre."

Defendants have filed this motion for summary judgment on the grounds that no genuine issue of material fact exists and are therefore entitled to a judgment upholding the constitutionality of the ordinance.

In the case of *City of Lake Charles v. Wallace*, 170 So.2d 654, a decision which upheld the constitutionality of a city ordinance imposing a service charge on residents in order to defray the costs of garbage disposal, the Louisiana Supreme Court states:

> "All that is demanded by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States is that a charge affect alike all persons similarly occupied . . . The method of classification is primarily and pecularily a matter for the legislating body to determine; the courts will not interfere with the body's exercise of discretion if it is based on reason.
>
> "Due process of law and the equal protection of the law are had when the laws affect alike all persons similarly situated."

Also, the Supreme Court of the United States has stated in *McGowan* v. *State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101 (1961), as follows:

> "The Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the State's objective . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Defendants contend that the classification set forth in Municipal Ordinance 4744 (New Orleans City Code Section 46-1.1) is a legitimate classification in that it seeks to protect the area known as the Vieux Carre from needless peddlers and hawkers. Plaintiff in this

case is not invidiously discriminated against by the terms of the ordinance. In truth, the entire City of New Orleans is available to plaintiff to sell her goods with the exception of the area known as the Vieux Carré.

The interests of the City of New Orleans and the State of Louisiana are vitally affected as regards to that section known as the Vieux Carré. The economic welfare of the City of New Orleans rests on this specially designated area. It is the heart of the City's tourist industry. The incalculable value of this tourist trade prompted the City Council to adopt ordinances to preserve the integrity and to insure the economic viability of the area in a way most conducive to both tourist and citizen alike. No tourist or citizen appreciates peddlers or hawkers interfering with their rights to observe and to enjoy the beauties of the New Orleans Vieux Carré. The fact that some peddlers are allowed to peddle and not the plaintiff in this action only tends to demonstrate the City Council's interest in keeping the Vieux Carré the tourist attraction it has always been. The Council sought to allow those peddlers to remain who have over a long period of time become a part of the charm and beauty that is the Vieux Carré. The City should not be caused to lose its entire remedial scheme merely because it failed to cover every peddler at one time.

As the Supreme Court of the United States stated in *Norvell* v. *State of Illinois*, 373 U.S. 420, 83 S.Ct. 1366 (1963):

> "Exact equality is no prerequisite of equal protection of the laws within the meaning of

> the Fourteenth Amendment . . . The rough accommodations made by government do not violate the equal protection clause unless the lines drawn are hostile and invidious."

Also, in the case of *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 93 S.Ct. 1224 (1973), the Supreme Court said:

> "The equal protection clause does not make every minor difference in the application of laws to different groups a violation of one Constitution."

It is therefore submitted by the defendants that the ordinance in question is constitutional and not violative of the equal protection and due process clause of the Constitution of the United States in that it promotes a compelling state and local interest and that it does not invidiously discriminate against the plaintiff in this action. Accordingly, defendants are entitled to a granting of this motion for summary judgment and a declaration by this Court of the constitutionality of this ordinance.

/s/ JOEL P. LOEFFELHOLZ
JOEL P. LOEFFELHOLZ
ASSISTANT CITY ATTORNEY
715 S. Broad Street
New Orleans, Louisiana 70119
822-7145

BLAKE G. ARATA
CITY ATTORNEY

[25] 19. MOTION OF PLTF. FOR SUMMARY JUDGMENT: 10:00 AM

WEDNESDAY, OCTOBER 3, 1973

ORDERED:
Argument: *DENIED.*

MOTION OF DEFTS. FOR SUMMARY JUDGMENT:
ORDERED:
Argument: *GRANTED.*

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[26] JUDGMENT

Filed Oct. 9, 1973

United States District Court
Eastern District of Louisiana

Nancy Dukes d/b/a Louisiana Concessions

versus

Civil Action
No. 72-2042
Section "I"

The City of New Orleans and
The Honorable Moon Landrieu

The Court previously having granted the motion of defendants, The City of New Orleans, and The Honorable Moon Landrieu, for Summary Judgment; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, The City of New Orleans, and The Honorable Moon Landrieu, and against plaintiffs, Nancy Dukes d/b/a Louisiana Concessions, dismissing said plaintiffs' suit, with costs.

Dated at New Orleans, Louisiana, this 9th day of October, 1973.

/s/ BENJAMIN W. REISCH
BENJAMIN W. REISCH,
CLERK

APPROVED AS TO FORM:
/s/ JACK M. GORDON
UNITED STATES DISTRICT
JUDGE
Okla Jones, II, Esq.
Joel P. Loeffelholz, Esq.

[27] NOTICE OF APPEAL

Filed: Oct. 29, 1973

United States District Court
Eastern District of Louisiana
New Orleans Division

Nancy Dukes d/b/a
Louisiana Concessions,

Plaintiff

versus

Civil Action
No. 72-2042
Section "I"

The City of New Orleans, and
The Honorable Moon Landrieu

Defendants

Notice is hereby given that Nancy Dukes, Plaintiff-Appellant in the above named action, hereby appeals to the United States Court of Appeals for the Fifth Circuit, from the order denying plaintiff relief from arbitrary, unreasonable, and discriminatory denial to operate her business of selling foodstuffs in the Vieux Carré which was entered in this action on the 3rd day of October 1973 pursuant to joint summary judgment motion by both parties.

/s/ OKLA JONES II
Okla Jones II
ACLU of Louisiana
606 Common Street
New Orleans, LA 70130

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Telephone: 522-0617
Attorney for Appellant

/s/ JOSEPH NEVES MARCAL, III,
JOSEPH NEVES MARCAL, III,
T.A.
General Counsel
ACLU of Louisiana
518 South Rampart Street
New Orleans, Louisiana 70113
Phone: 581 7331
NOTE: ABOVE COUNSEL TO RECEIVE ALL NOTICES — TRIAL ATTORNEY HANDLES THIS APPEAL

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[28] BOND FOR COSTS

(Number and Title Omitted)

Filed: Oct. 29, 1973

KNOW ALL MEN BY THESE PRESENTS, that, whereas the undersigned and herein bound Jack P. Jackson, and Dayle Janss have been required by the Eastern District Court in and for the Parish of Orleans requiring them to give security for costs herein in the sum of Two Hundred and Fifty Dollars ($250.00);

We, the undersigned principal and surety, do by these presents firmly bind ourselves to be responsible for all costs for which Nancy Dukes, Plaintiff, may be cast in these proceedings, and for payment of which we,

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JACK P. JACKSON, as Principal
and
DAYLE JANSS, as Surety,

both residents of the Parish of Orleans, are by these presents, held and firmly bound unto Benjamin W. Wreisch, Clerk of Court of the Eastern District Court for the Parish of Orleans, and his successor in office in the full sum of Two Hundred and Fifty Dollars ($250.00), lawful money of the United States of America.

New Orleans, Louisiana, October 26, 1973.

/s/ JACK P. JACKSON
PRINCIPAL
/s/ DAYLE JANSS
SURETY

(Affidavits of Sureties Omitted in Printing)

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[29] MOTION TO BE RECOGNIZED
AS COUNSEL OF RECORD — ON APPEAL

(Number and Title Omitted)

Filed: Oct. 30, 1973

Now comes Joseph Neves Marcal, III, general counsel for the American Civil Liberties Union for Louisiana; and on further suggesting to the court he is

desirous of being placed as attorney of record in the above matter; and on further suggesting to the court that he will be handling the appeal of the above matter;

IT IS ORDERED that Joseph Neves Marcal, III, Esquire, be and the same is hereby placed upon the record in the above matter for the above cited reasons.

New Orleans, Louisiana, this 30 day of October, 1973.

/s/ JACK M. GORDON
JUDGE

Respectfully Submitted by:
/s/ JOSEPH NEVES MARCAL, III
JOSEPH NEVES MARCAL, III
518 So. Rampart Street
New Orleans, Louisiana 70113
Phone: 581-7331

(Certificate of Service Omitted in Printing)

(Clerk's Certificate of Record to Fifth Circuit Omitted in Printing.)

[30] JUDGMENT

Filed: Oct. 22, 1974

United States Court of Appeals
For the Fifth Circuit

October Term, 1973

No. 73-3979
Summary Calendar

D. C. Docket No. CA-72-2042 "I"

Nancy Dukes d/b/a Louisiana Concessions,
Plaintiff-Appellant,

versus

The City of New Orleans and
Honorable Moon Landrieu,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

September 27, 1974

Issued as Mandate: Oct. 2, 1974

[30] UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
October 21, 1974

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130

Mr. Benjamin W. Reisch, Clerk
U.S. District Court
Room 306, 400 Royal St.
New Orleans, La. 70130

No. 73-3979 — Nancy Dukes d/b/a Louisiana Concessions vs. The City of New Orleans and Honorable Moon Landrieu

(Dist. Ct. No. CA-72-2042)

Dear Sir:

Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

Enclosed herewith are the following additional documents:

Copy of the Court's opinion.

Original record on appeal or review. (TO BE RETURNED LATER)

Very truly yours.
EDWARD W. WADSWORTH
Clerk
/s/ [ILLEGIBLE]
Deputy Clerk

enc. (LETTER ONLY)
cc: Mr. Okla Jones, II
Mr. Joseph Neves Marcal, III
Mr. William E. Rittenberg
Mr. George M. Strickler, Jr.
Messrs. Blake G. Arata
Joel P. Loeffelholz

September 27, 1974

Issued as Mandate: Oct. 2, 1974